

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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ERIC L. DALE,

Petitioner,

v.

BRIAN E. WILLIAMS, *et al.*,

Respondents.

Case No. 3:20-cv-00031-MMD-CLB

ORDER

**I. SUMMARY**

This is a habeas corpus action under 28 U.S.C. § 2254. Petitioner Eric L. Dale first filed a motion for leave to file a second-amended petition that Respondents opposed on the basis that Petitioner had failed to attach a proposed amended petition. (ECF No. 31.) The Court denies that motion as moot because Petitioner subsequently filed a renewed motion for leave to file a second-amended petition ("Motion") and attached a proposed second-amended petition. (ECF No. 36.) The Motion also seeks to extend the previously-granted equitable tolling due to COVID-19 to February 24, 2022. Respondents oppose in part. (ECF No. 40.) Dale replied. (ECF No. 41.) The Court finds that Petitioner has diligently attempted to comply with the terms of the Court's order granting equitable tolling and grants the motion for leave to file a second-amended petition.

**II. LEGAL STANDARD AND PROCEDURAL HISTORY**

A jury convicted Dale of several counts including attempted murder with a deadly weapon, and the state district court adjudicated him a habitual criminal. (ECF No. 4 at 2, 4-6.) Under 28 U.S.C. § 2244(d)(1)(A), Dale had one year from the date his judgment of conviction became final to file a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The judgment became final when the time expired to petition the Supreme Court of the United States for a writ of certiorari. *See Jimenez v. Quarterman*, 555 U.S. 113,

1 119-20 (2009). See also Sup. Ct. R. 13(1). The Federal Public Defender (“FPD”) 2 represents Petitioner in this action and has indicated that the statute of limitations expired 3 on November 2, 2020. (ECF No. 9 at 2.)

4 Petitioner dispatched his initial proper-person § 2254 petition to a prison officer for 5 mailing to the Court on or about January 14, 2020. (ECF No. 4.) When the Court appointed 6 the FPD, it gave Petitioner the opportunity to file a counseled amended petition. (ECF No. 7 3.) Petitioner sought prospective equitable tolling under the rare circumstances presented 8 by the COVID-19 pandemic because the FPD was unable to complete its investigation 9 due to restrictions on visitation. (ECF No. 9.) The Court granted Petitioner’s motion and 10 directed that the amended petition be filed 30 days after receipt of a neuropsychological 11 report. (ECF No. 15.) Petitioner now moves for an extension of equitable tolling and for 12 leave to file a second-amended petition. (ECF No. 36.)

### 13 **III. DISCUSSION**

#### 14 **A. Motion for Leave to File Amended Petition**

15 The FPD had retained neuropsychologist Brian Leany to interview and administer 16 testing to Petitioner. (ECF No. 9.) Apparently, Petitioner’s erratic behavior surrounding the 17 incidents for which he was convicted of attempted murder led to significant questions 18 regarding his mental health. (See ECF No. 12.) Dr. Leany was able to enter Warm Springs 19 Correctional Center on August 16, 2021. (See ECF No. 31-1.) Thereafter, Dr. Leany 20 advised the FPD that he believed that a psychiatrist was the appropriate expert to evaluate 21 Petitioner and render an expert opinion. The FPD therefore filed a protective petition on 22 September 15, 2021 and filed a motion for leave to file a second-amended petition. (ECF 23 Nos. 27, 31.) The FPD informs the Court that she diligently sought to hire a psychiatrist 24 and was ultimately able to obtain a final report on January 25, 2022. (ECF No. 36 at 2; 25 see also FPD Declaration, ECF No. 31-1.)

26 Equitable tolling is appropriate where external forces, rather than a petitioner’s lack 27 of diligence, account for the failure to file a timely claim. See *Miles v. Prunty*, 187 F.3d 28 1104, 1107 (9th Cir. 1999). Analyzing whether equitable tolling was warranted in this case,

1 the Court previously stated that it had little to no doubt that Petitioner, represented by the  
2 FPD, was pursuing his rights diligently. The extraordinary circumstance of the COVID-19  
3 pandemic is ongoing, and it prevented Petitioner from completing his investigation and  
4 securing the proper expert report in order to file a timely amended petition up until the  
5 report was secured on January 25, 2022. Thereafter, Petitioner promptly filed a motion for  
6 leave to file a second-amended petition along with a proposed amended petition on  
7 February 16, 2022. (ECF No. 36.)

8 Respondents do not object to Petitioner filing an amended petition. (ECF No. 40.)  
9 However, Respondents argue that Petitioner is not entitled to equitable tolling that extends  
10 past this Court's original grant of tolling. The Court acknowledges that it directed that  
11 "[o]nce the evaluation has been completed and Dr. Leany issues a report, Petitioner will  
12 have 30 days to file an amended petition . . . The tolling will not be further extended." (ECF  
13 No. 15 at 5.) The Court also acknowledges that Respondents previously expressed  
14 concerns that Petitioner sought "unlimited" equitable tolling. (ECF No. 11.) However, the  
15 Court still disagrees that this is Petitioner's aim. Respondents are correct that COVID  
16 restrictions on life and work in general are different currently than at the time the Court  
17 granted Petitioner equitable tolling. But the Nevada Department of Corrections ("NDOC")  
18 visitation restrictions—while varied at some points—largely have remained in place.<sup>1</sup> Once  
19 Dr. Leany informed the FPD that he was not the appropriate expert, the FPD secured a  
20 psychiatrist and sought leave to amend the petition within 30 days of receiving the final  
21 report. The parties characterize the situation as a request for additional equitable tolling.  
22 But under these rare, specific circumstances of the pandemic, the Court remains mindful  
23 of the interests of judicial efficiency and the significant and evolving hurdles litigants  
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26 <sup>1</sup>The NDOC website currently reflects that visitation operations returned to normal  
27 as of April 11, 2022. See NDOC, *Visiting Information*, [Doc.nv.gov/Inmates/Visiting/Home/](https://doc.nv.gov/Inmates/Visiting/Home/)  
28 (last accessed July 20, 2022). The NDOC website does not set forth the history of when  
visitation was restricted/prohibited throughout the pandemic. But the website also  
indicates that normal visitation was resumed on February 14, 2022. Thus, while the  
precise timeline is unclear, the website shows that visiting has been only sporadically  
permitted at best.

1 continue to face. The Court therefore views Petitioner's filing of a proposed amended  
2 petition upon receipt of the necessary expert report to be in substantial compliance with  
3 this Court's original order granting equitable tolling. Accordingly, the Court grants the  
4 motion for leave to file a second-amended petition. To the extent necessary, the Court  
5 also grants the request to extend equitable tolling up to February 16, 2022. The Court  
6 emphasizes that nothing prevents Respondents from raising any applicable procedural  
7 defenses.

#### 8 **B. Motions for leave to file exhibits under seal**

9 Petitioner has filed two motions to file certain exhibits under seal. (ECF Nos. 30,  
10 38.) Respondents have indicated that they do not oppose either motion. (ECF Nos. 32,  
11 39.) While there is a presumption favoring public access to judicial filings and documents,  
12 a party seeking to seal a judicial record may overcome the presumption by demonstrating  
13 "compelling reasons" that outweigh the public policies favoring disclosure. See *Nixon v.*  
14 *Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Kamakana v. City and County*  
15 *of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (citations omitted). In general,  
16 "compelling reasons" exist where the records may be used for improper purposes. See  
17 *Kamakana*, 447 F.3d at 1179 (citing *Nixon*, 435 U.S. at 598).

18 Here, Petitioner asks to file his relevant medical records, psychological evaluations,  
19 presentence investigation report questionnaire, and juvenile education records under seal  
20 because they contain information that is confidential and sensitive, including Dr. Berger's  
21 psychiatric evaluation. (ECF Nos. 30, 38.) The Court has reviewed the exhibits and  
22 concludes that Petitioner has demonstrated compelling reasons to file the exhibits under  
23 seal. Accordingly, the Court grants the two motions to seal, and the exhibits remain under  
24 seal.

#### 25 **IV. CONCLUSION**

26 It is therefore ordered that Petitioner's motion for leave to file a second-amended  
27 petition and to briefly extend equitable tolling due to COVID-19 (ECF No. 36) is granted  
28 as set forth in this order.

1 It is further ordered that the Clerk of Court detach and file separately Petitioner's  
2 second-amended petition (ECF No. 36 at 6-35).

3 It is further ordered that Petitioner's earlier-filed motion for leave to file a second-  
4 amended petition (ECF No. 31) is denied as moot.

5 It is further ordered that Petitioner's two motions for leave to file exhibits under seal  
6 (ECF Nos. 30 and 38) are both granted.

7 It is further ordered that Respondents' motion for extension of time to respond to  
8 the petition (ECF No. 35) is granted. Respondents must file a response to the second-  
9 amended petition within 45 days of the date of entry of this order.

10 DATED THIS 21<sup>st</sup> Day of July 2022.

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13 MIRANDA M. DU  
14 CHIEF UNITED STATES DISTRICT JUDGE  
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